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*NOT ADMITTED TO THE NEW YORK BAR

July 15, 2020

BY EMAIL/ECFThe Honorable Katherine Polk Failla
United States District Judge
Southern District of New York
40 Foley Square
New York, NY 10007*United States v. Anilesh Ahuja,*
18 Cr. 328 (KPF)

Dear Judge Failla:

We write briefly concerning the new disclosure made by the government on Saturday, July 11, 2020, and to clarify two points relevant to our July 6, 2020 submission.

On July 11, 2020, the government produced for the first time an email attaching a draft allocation that was sent to the government by counsel for cooperating witness Frank Dinucci on April 5, 2017, the day before Dinucci's plea.¹ The government had previously produced a different draft allocation from Dinucci's counsel, which had

¹ Ex. A, July 11, 2020 Email from Gov't; Ex. B, April 5, 2017 Email from D. Zinman to Gov't with Revised Draft Dinucci Allocation.

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been sent to the government approximately 40 minutes earlier on April 5, 2017.² The newly disclosed documents reveal a second and revised draft of the allocution, and a cover email from Dinucci's lawyer stating, "Please call me if you'd like to discuss."

This recent disclosure constitutes another instance in which the government failed to produce to the defense a communication with a cooperating witness's counsel that falls within the ambit of the witness's *Giglio* and 3500 material. This disclosure also calls into question the accuracy of other representations the government made to the Court.

On June 6, 2019, the Court ordered the government to "review all of your attorney communications in this case," and the government represented that it would "search *again* to make sure that -- to see if there are any other draft allocutions or anything like that to make sure."³ The prosecutors then represented to the Court in writing on June 8, 2019, that they had "reviewed [their] file, *including archived emails*, for all communications with attorneys for witnesses in this case," and produced the results of that review.⁴ Yet, the newly disclosed email and revision to the Dinucci allocution were not produced. Notably, even if the government attorneys had deleted that email—which would itself raise concerns—it still would have been in the government's web-based backup (which the government has said retains deleted emails for three years) and thus easily retrievable.

Likewise, in its June 24, 2020 letter to the Court, the government represented that it would produce by June 26, 2020, the results of searching "all of their internal emails beginning two days prior to the plea proceedings for Majidi and cooperating witnesses Frank Dinucci and Ashish Dole, up to and including the date of those plea proceedings" for "internal or external communications regarding the substance or content of any draft, proposed, or actual plea allocution relating to the scheme alleged in this case; . . . and all versions of any draft, proposed, or actual plea allocutions relating to the scheme alleged in this case."⁵ The email and revised version of the Dinucci allocution were not included in the June 26, 2020 production either.

Finally, and relatedly, this most recent disclosure undermines the government's contention that, although deleted emails related to Dinucci's April 2017 plea were retained only until April 2020, "there is no reason to believe that any emails from April 2017" were deleted such that they would only be on the web-based backup.⁶ The government's assurance that relevant materials were not lost as a result of its delay provides little comfort in the face of new documents still coming to light even to this day.

² April 5, 2017 Email from D. Zinman to Gov't with Initial Draft Dinucci Allocution, ECF 210, Ex. I.

³ Trial Tr. 479:13-23 (emphasis added); Trial Tr. 480: 12-15.

⁴ June 8, 2019 Gov't Letter, ECF 209 at 1 (emphasis added).

⁵ June 24, 2020 Letter from Gov't, ECF 371 at 2–3.

⁶ *See id.* at 3 n.1.

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We also wish to correct two points related to our July 6, 2020 letter. First, consistent with the government's acknowledgment that Amin Majidi's final allocation before Your Honor "matches" the revised allocation that was prepared and circulated to the prosecution team by Mr. Naftalis,⁷ our letter stated that Majidi read the Naftalis-authored allocation without any modification. Upon further review, however, we recognize that, as compared to the version Mr. Naftalis circulated to the other AUSAs, the final allocation Majidi read in court did not include a sentence near the end about the use of "interstate emails and text messages," added the word "fees" in one sentence, and omitted the word "month-end" in one sentence.⁸ These modifications do not affect the substance of the arguments made in our July 6, 2020 letter.

Second, our July 6, 2020 letter describes two email exchanges concerning conversations between the government and Dole's lawyer on the day of Dole's plea. The first is an "internal" email exchange between the prosecutors and FBI arranging to speak with Dole's counsel on the day of the plea.⁹ The email exchange reveals that one of the unit chiefs who handled Dole's plea was trying to reach Dole's lawyer before the plea and set up a time to do so. The second email described in our letter was an email sent from one of the unit chiefs to Dole's lawyer the day after the plea concerning the scheduling of a presentence interview.¹⁰ In that November 14, 2017 email, the unit chief also remarked, "It was good to see you yesterday. Thanks for making yourself available for a few minutes before the proceeding."¹¹

The government did not bring either of these documents to the Court's attention when the Court inquired about changes to the cooperators' allocutions or when the Court specifically asked the government whether there were oral communications with Dole's counsel concerning Dole's plea allocation. And, to our knowledge, the government did not produce either document before June 26, 2020. The email exchange between the

⁷ *Id.* at 2.

⁸ *Compare* Naftalis Allocation, ECF 385, Ex. 8 at USAO_SDNY_26368 ("As part of this scheme, I used interstate emails and text messages."), *with* Majidi Plea Tr. 32:7–10, ECF 210, Ex. C (omitting foregoing sentence included in Naftalis Allocation); *see* Majidi Plea Tr. 31:24–32:1, ECF 210, Ex. C ("The funds' net asset value and their performance also determined PPI's management **fees** and performance fees." (emphasis added)); *compare* Naftalis Allocation, ECF 385, Ex. 8 at USAO_SDNY_26367 ("Between 2014 and 2016, I participated in a scheme with, among others, Neil Ahuja, CEO of PPI, and Jeremy Shor, a trader at PPI, to fraudulently inflate the **month-end** net asset value of the funds that PPI managed." (emphasis added)), *with* Majidi Plea Tr. 32:2–5, ECF 210, Ex. C (omitting "month-end").

⁹ November 13, 2017 Email Exchange Between FBI and AUSAs, ECF 385, Ex. 15 at USAO_SDNY_026395–USAO_SDNY_026396.

¹⁰ November 14, 2017 Email from Gov't to G. Kehoe, ECF 385, Ex. 16 at USAO_SDNY_026398.

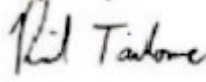
¹¹ *Id.*

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unit chiefs and Dole's lawyer from the day after the plea, however, was among more than 1,300 pages of materials produced to Mr. Ahuja's counsel by Dole's lawyers during trial on June 3–4, 2019. We therefore want to clarify that while it was not previously produced *by the government*, that particular email was produced to Mr. Ahuja's counsel by Dole's lawyers in response to a Rule 17 subpoena.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Roberto Finzi".

Roberto Finzi

Richard C. Tarlowe

cc: Counsel of Record